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Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ALTADIS U.S.A. INC., *et al.*,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN LEGACY FOUNDATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae American Legacy Foundation ("Legacy") is an organization created in 1998 by the Master Settlement Agreement ("MSA") between tobacco manufacturers and attorneys general from 46 states and five territories, with a primary purpose of preventing underage tobacco use.[1] To this end, Legacy operates and funds a countermarketing campaign, sponsors public education, and conducts research on the effects of tobacco advertising on youth. Its board of directors is composed of two state attorneys general, two governors, two members of state legislatures, one youth, and four members who are experts in medicine, public health, and tobacco research.

Legacy believes that any successful program to eliminate underage tobacco use must include not only public education, but also stringent restrictions on advertising that bombards youth with positive messages about tobacco use. Tobacco advertising significantly increases youth smoking, and no amount of countermarketing, standing alone, can extinguish youth demand for tobacco products. Legacy therefore supports the restrictions imposed by Massachusetts because the tobacco ads at issue make youth a captive audience and present unfair and inherently deceptive messages to that audience about tobacco use.

STATEMENT

After decades of sustained public education about the adverse health effects of smoking, adolescents are the only age group that continues to take up smoking in significant numbers. Each day in the United States, 6,000 children under age 18 try their first cigarette, and over half of those be-

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[1] Pursuant to Rule 37.6, Legacy states that no counsel for a party authored any portion of this brief, and no person other than Legacy made any monetary contribution to its preparation or submission. Letters of consent to its filing have been lodged with the Clerk pursuant to Rule 37.3.

come daily smokers.[2] Nearly one in three American teenagers smokes. Tobacco use is the leading cause of preventable illness and death in the United States, with more than 400,000 Americans dying from smoking-related diseases each year. An estimated 25 million people, including five million of today's children, will die prematurely of smoking-related disease.[3] As this Court has recognized, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

In order to address this threat, states must implement comprehensive anti-smoking programs for young people. Health authorities and researchers agree that a critical component of any successful anti-tobacco program is advertising regulation, because tobacco ads are a significant contributing factor to underage smoking.[4]

1. The Health Risks of Underage Smoking

The age at which one begins smoking greatly influences the amount of smoking one will engage in as an adult and ultimately influences the smoker's risk of tobacco-related disease and death. Among adult smokers, those who started

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[2] *See* United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Incidence of Initiation of Cigarette Smoking — United States, 1965-1996*, 47 MORBIDITY & MORTALITY WKLY. REP. 837, 838 (1998).

[3] *See* United States Department of Health and Human Services, Centers for Disease Control & Prevention, *Reducing Tobacco Use: A Report of the Surgeon General — 2000* ("*Surgeon General 2000*"), Fact Sheet: A Call for Action (2000).

[4] *See Surgeon General 2000* at 6-7; Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,328-46 (proposed Aug. 11, 1995) ("FDA Proposed Tobacco Regulations"). Without addressing the validity of the FDA regulations under the First Amendment, this Court subsequently held in *Brown & Williamson* that the agency lacks statutory authority to regulate tobacco products.

smoking by early adolescence were more likely to be heavy smokers than those who began as adults. *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,317. Preventing youth smoking is obviously critical, because individual smoking patterns are established before adulthood: Nearly 90 percent of all adult smokers in the United States had their first cigarette by age 18.[5] The addictive properties of nicotine are most severe and enduring for those who begin smoking at the youngest ages.[6]

Cigarette smoking during childhood and adolescence produces significant health problems among young people, including an increased number and severity of respiratory illnesses, decreased physical fitness, an unfavorable lipid profile, and potential retardation in lung growth and lung function. *See Surgeon General 1994* at 15-29. All else being equal, the younger the age at which a person begins to smoke, the greater the risk of lung cancer and other smoking-related diseases. Lung-cancer mortality in males is highest among adults who begin smoking before the age of 15.[7] If an adolescent's tobacco use continues for a lifetime, there is a 50 percent chance that he or she will die prematurely as a direct result of smoking. *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,318. Smoking is responsible for approximately 30 percent of all cancer deaths (including 87

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[5] *See* United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, at 65 tbl.7 (1994) ("*Surgeon General 1994*").

[6] *See Surgeon General 1994* at 30-34; Richard J. Bonnie & Barbara S. Lynch, *Time to Up the Ante in the War on Smoking*, 11 ISSUES IN SCIENCE & TECH. 33, 35 (1994).

[7] *See* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1327 n.676 (1998); United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Reducing The Health Consequences of Smoking — 25 Years of Progress: A Report of the Surgeon General*, at 45 fig.3 (1989) ("*Surgeon General 1989*").

percent of lung cancer deaths), 82 percent of deaths from chronic obstructive pulmonary disease, 21 percent of deaths from coronary heart disease, and 18 percent of deaths from stroke.[8]

2. The Abundant Research Linking Tobacco-Industry Advertising to Increased Underage Smoking

Tobacco is one of the most relentlessly marketed consumer products. The tobacco industry spends a staggering amount of money — $8.24 billion, or about $22 million each day, in 1999 (an increase of more than 22 percent over the prior year's spending) — to advertise its products. *See* Federal Trade Comm'n, *Cigarette Report for 1999*, at tbl.3F (released 2001) ("*FTC Report 1999*").

a. The Industry's Practice of Targeting Underage Smokers

As the industry's own documents admitted in evidence in recent litigation make clear, tobacco manufacturers use advertising to target underage children and adolescents as "replacement smokers" for the 1.7 million customers lost each year to death and quitting. *See Surgeon General 2000* at 162.[9] The targeting of youth — dubbed the "starter" or "pre-smoker" market — has been a deliberate industry strategy based on research showing that children and adolescents

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[8] *See generally Surgeon General 1989* at 37-116. In addition, a causal relationship exists between tobacco use and cancers of the larynx, mouth, esophagus, and bladder; atherosclerotic peripheral vascular disease; cerebrovascular disease; and low birth weight babies. Cigarette smoking is also a probable cause of infertility and peptic ulcer disease and contributes to, or is associated with, cancers of the pancreas, kidney, cervix, and stomach. *See generally id.*

[9] In addition, tobacco companies have been shown to pay for the placement of both cigarettes and tobacco ads in areas of stores where children congregate, such as near candy displays. *See* California Dep't of Health Services, *California Tobacco Control Update* 7 & n.29 (Aug. 2000), *available at* www.dhs.cahwnet.gov / tobacco / documents / CTCUpdate.pdf. Likewise, the placement of tobacco ads below five feet — at kids' eye level — is another stratagem that attracts youth to tobacco products. *See id.*

are the most fertile demographic from which to cull the requisite 1.7 million new smokers annually.[10] An R.J. Reynolds strategic research report confirms that "[t]he renewal of the market stems almost entirely from 18-year-old smokers. No more than 5% of smokers start after age 24. . . ."[11] The simple arithmetic is that, without targeting youth, tobacco profits decline each year. Bennet Lebow, a prominent tobacco executive, articulated this inescapable economic reality: "If you really and truly are not going to sell to children, you are going to be out of business in 30 years." Mike Thomas, *Ad Sinks in as You See Body Bags*, ORLANDO SENTINEL, Oct. 5, 2000, at D1.

b. The Impact of Tobacco Advertising on Youth

Even when tobacco advertising is not intentionally aimed at children and adolescents, it is seen by youth and

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[10] *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,331. Numerous industry documents confirm that tobacco companies have targeted underage smokers. *See, e.g.*, Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, Final Rule, 61 Fed. Reg. 44,396, 44,481 n.129 (Aug. 28, 1996) ("FDA Final Rule"); R.J. Reynolds Draft Report of Apr. 15, 1976, Planning Assumptions and Forecast for the Period 1977-1986+ for R.J. Reynolds Tobacco Company at 14 ("Evidence is now available to indicate that the 14 to 18 year old group is an increasing segment of the smoking population. RJR-T *must soon* establish a successful *new* brand in this market if our position in the industry is to be maintained over the long term."), *available at* www.rjrtdocs.com/rjrtdocs/image_display.wm?PRODUCT=image&PAGE=1&DOC_RANGE=500232752+-2771&IMAGE_SIZE=890&SEARCH=0. The "Joe Camel" story is particularly revealing: That advertising campaign, which ran from 1988 to 1997, helped increase Camel's youth market share from three percent to more than 13 percent. *See* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,332.

[11] R.J. Reynolds Document of Feb. 29, 1984 at i, *available at* www.rjrtdocs.com / rjrtdocs/image_display.wm? PRODUCT=IMAGE&DOC_RANGE=501266969+-6976& SEARCH=3; *see also* 61 Fed. Reg. 44,481 n.129.

makes tobacco use attractive to them.[12] Tobacco manufacturers use sophisticated advertising strategies to communicate to the general public the symbolic social value of cigarettes. *See* POLLAY COMMENT at 2. They direct their money and marketing efforts so as to reach the consumers who are most likely to purchase their products, including youth.[13] As a retired Marlboro ad executive admitted: "'I don't know any way of [advertising tobacco] that doesn't tempt young people to smoke.'" Pollay et al. at 4 (citation omitted).

Ubiquitous Advertisements Foster "Friendly Familiarity." Tobacco advertising is everywhere: in stores, in newspapers and magazines, in motion pictures, in entertainment sponsorships, direct-mail promotions, coupons, and specialty items. Adolescents are inundated with tobacco advertising in various ways as they travel to and from schools and recreational areas and engage in other daily activities. The average 14-year-old has been exposed to more than $20 billion in tobacco advertising and promotions. *See Surgeon General 2000*, Executive Summary at 16. These massive advertising expenditures do not go unnoticed by youths: Studies have found that six-year olds can reliably recall tobacco advertising, and that primary school children can correctly identify tobacco brands in advertisements when brand identifications are deleted.[14]

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[12] *See* RICHARD W. POLLAY, COMMENT ON 940 CMR 19 AND 940 CMR 20, PROTECTING CHILDREN AS CONSUMERS: COMMENTS ON PROPOSED REGULATIONS RE: PACKAGING, MARKETING, DISTRIBUTION AND SALES OF CIGARETTES, ETC. 18 (June 1, 1998) ("POLLAY COMMENT"); Richard W. Pollay et al., *The Last Straw? Cigarette Advertising and Realized Market Share Among Youths and Adults, 1979-1993*, 60 J. Marketing 1, 11 (1996) ("The most important [public policy implication from our study] stems from our finding that, whether or not intended, cigarette advertising is significantly related to adolescents' smoking behavior.").

[13] *See* K. Michael Cummings et al., Discrepancies in Cigarette Brand Sales and Adult Market Share: Are New Teen Smokers Filling the Gap?, 6 TOBACCO CONTROL S38, S38 (1997).

[14] *See* Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children*, 266 JAMA 3149, 3149 (1991).

This unrelenting exposure of children and adolescents to tobacco advertisements is, at best, an unavoidable consequence of the industry's deliberate strategy to foster a "friendly familiarity" with tobacco products. *See* Pollay et al. at 17. The industry bases this strategy on the well-known psychological principle that repeated exposure to a stimulus leads to favorable attitudes toward it.[15] Children and adolescents not only notice tobacco advertisements and remember them, but they also form favorable attitudes toward tobacco products from repeated exposure to advertisements that are three times stronger than the attitudes formed by adults.[16] The appeal of tobacco advertising imagery makes preventing underage smoking significantly more difficult because exposure to advertisements leads not only to favorable attitudes toward the brand being advertised (*e.g.*, Camels or Marlboros), but also toward the product (cigarettes) more generally; this favorable attitude fosters both intentions to use the product and actual consumption.[17]

Tobacco Advertising and Adolescent Immaturity. Unlike adults, who, if adequately informed, are assumed to be capable of making voluntary and rational choices, children and adolescents are generally too cognitively immature to make a rational choice to smoke when the information on which they base their decision is incomplete (and thus inac-

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[15] *See Surgeon General 2000*, Executive Summary at 16; Jeffrey Jensen Arnett & George Terhanian, Adolescents' Responses to Cigarette Advertisements: Links Between Exposure, Liking, and the Appeal of Smoking, 7 TOBACCO CONTROL 129, 132 (1998).

[16] *See* POLLAY COMMENT at 15; Pollay et al. at 12; John P. Pierce et al., *Does Tobacco Advertising Target Young People to Start Smoking: Evidence from California*, 266 JAMA 3154, 3157-58 (1991); Joe B. Tye et al., *Tobacco Advertising and Consumption: Evidence of a Causal Relationship*, 8 J. PUB. HEALTH POL'Y 492, 498-501 (1987).

[17] *See* Ellen Feighery et al., *Seeing, Wanting, Owning: The Relationship Between Receptivity to Tobacco Marketing and Smoking Susceptibility in Young People*, 7 TOBACCO CONTROL 123, 128 (1998); Pollay et al. at 12.

curate). Youth rely more on social factors in making decisions than do adults; and this reliance correlates perfectly with the tobacco industry's strategy of influencing the perceptions and attitudes not only of smokers and pre-smokers, but also of their families and friends. *See* Tye et al. at 498.

Marketing experts know that teens, who are often uncertain about themselves and who want to belong and be popular, are especially susceptible to advertising and peer group influences as they actively search for cues for the "right" way to look and behave. Research shows that by high school, teens use possessions and "badge products," such as cigarettes, to express their identities, to explore the world and their newfound freedoms in it, and to rebel against the authority of parents and others. *See* Pollay et al. at 19-20.

Although the tobacco industry is no longer permitted to use cartoons such as the "Joe Camel" character to solicit young people overtly, it nonetheless understands that its advertising imagery — themes of independence, adventure-seeking, social approval, sexuality, success, sophistication, and an active and healthy lifestyle — resonates with adolescent needs for autonomy and freedom from authority. As one manufacturer acknowledged: "Smoking a cigarette for the beginner is a symbolic act. . . . 'I am no longer my mother's child,' 'I am tough,' 'I am an adventurer,' 'I'm not a square.' . . . As the force from the psychosocial symbolism subsides, the pharmacological effect takes over to sustain the habit . . . ."[18] The highly repetitive "healthy lifestyle" and "cool attitude" themes of tobacco ads, presented by youthful-looking models, serve to normalize and glamorize smoking.

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[18] Philip Morris Report of Fall 1969, *Why One Smokes*, First Draft of Annual Report to Philip Morris Board by V.P. for Research and Development, *available at* www.tobaccodocuments.com/view.cfm?docid=1003287836/7848&source=SNAPPM&showimages=yes.

The ads lead adolescents to believe that tobacco use is socially acceptable, safe, and healthy.[19]

The ubiquitous ads also cause teens seriously to distort the prevalence and popularity of smoking among their peers and adults.[20] The overestimation is understandable, when, in Massachusetts for example, more than half of retail-storefront ads are for tobacco. *See* Massachusetts Department of Public Health, *Massachusetts Operation Storefront 1998*, at 5 (1998) ("*Storefront 1998*"). Youth overestimation of smoking prevalence is of great concern to health officials because it is a strong predictor of teen smoking.[21]

While overestimating the prevalence and attraction of smoking, teens simultaneously underestimate the nature of nicotine addiction and the serious adverse health effects of tobacco use. Studies show that adolescents "simply do not appreciate the personal relevance of the long-term statistical risks of multiple diseases, and they suffer from a profound inability to understand the power of nicotine." Bonnie & Lynch at 35. Feeling immortal, they falsely assume that they can control the long-term risks of tobacco simply through personal choice. *See id.* at 34-35. Whereas only five percent of high school seniors who smoke believe they will be smoking five years after graduation, in fact 73 percent are still smoking an average of eight years later. *See* Tye et al. at

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[19] *See* POLLAY COMMENT at 15; *see also* Pollay et al. at 5 (finding that even brief cigarette advertising exposure in a laboratory setting can result in teens having more favorable thoughts about smokers, enhanced attitudes and increased awareness about tobacco use, and changed brand preferences).

[20] *See* Howard Leventhal et al., *Is the Smoking Decision an Informed Choice?*, 257 JAMA 3373, 3374 & tbl.1, 3375-76 (1987) (finding that young people greatly overestimate the extent to which their peers and adults smoke; the mean youth estimate of adult smokers was 66 percent, while national data indicate that about 30 percent of adults smoke).

[21] *See* Pollay et al. at 4; Laurie Chassin et al., *Predicting the Onset of Cigarette Smoking in Adolescents: A Longitudinal Study*, 14 J. APPLIED PSYCHOL. 224, 239 (1984).

503. The reality is that, once they begin to smoke regularly, half of adolescent smokers will not quit successfully for at least 16 to 20 years, and half of those who have not quit by then will die from a smoking-related disease.[22]

Taken together, this overestimation of smoking prevalence and attraction and underestimation of the risks of tobacco use cast serious doubt on whether an adolescent's decision to smoke is an informed choice or decision in any meaningful sense. *See* Bonnie & Lynch at 34-35; Leventhal et al. at 3376. Tobacco advertising, which exposes immature and unsophisticated teens to incomplete and thus inherently deceptive information, fundamentally distorts (and undermines the fairness of) the process by which consumers typically evaluate products and decide whether to use them.

c. Recent Studies Specifically Linking Advertising to Underage Smoking

Recent studies demonstrate that tobacco advertising is one of the most important — if not *the* most important — factors that impact a teen's decision to smoke.[23] One such study reports that, among California youth, "it is clear that the effect of advertising and promotional activities precedes the development of susceptibility to smoking. The effect is strong and specific, with at least 34% of experimentation with cigarettes attributed to these activities."[24] A second study found similar associations between advertising and the

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[22] *See* John P. Pierce et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511, 515 (1998) ("Tobacco Industry Promotion"); Elizabeth A. Gilpin et al., *Are Adolescents Receptive to Current Sales Promotion Practices of the Tobacco Industry?*, 26 PREVENTIVE MED. 14, 20 (1997).

[23] *See Surgeon General 2000* at 7; Gilbert J. Botvin et al., *Smoking Behavior of Adolescents Exposed to Cigarette Advertising*, 108 PUB. HEALTH REPS. 217, 223 (1993); Michael Klitzner et al., *Research Report: Cigarette Advertising and Adolescent Experimentation with Smoking*, 86 BRIT. J. ADDICTION 287, 296-97 (1991).

[24] *See* Pierce et al., *Tobacco Industry Promotion* at 514-15.

decision to start smoking among youth in Massachusetts.[25] A third study, also of Massachusetts youth, found that brand-specific magazine advertising exposure in 1993 was highly correlated to decisions by teens to begin smoking over the next four years.[26] Indeed, beyond linking advertising exposure to the decision to smoke, the growing body of recent research shows that exposure to cigarette marketing is a more important predictor of youth experimentation with cigarettes than is parental or sibling smoking.[27]

3. The Impact of Outdoor Advertising on Youth in Massachusetts

The impact of outdoor advertising — including storefront ads, sidewalk "sandwich boards," and outward-facing ads inside stores — on youth is enormous, despite the relatively small amount of money the tobacco industry spends on such advertising.[28] Outdoor advertisements, because they are intrusive and vivid, are ideal for the image-based advertising tactics employed by the tobacco industry to attract youth smokers. Because of their fixed locations, outdoor ads produce high levels of repeated exposure to kids who regularly

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[25] *See* Lois Biener & Michael Siegel, *Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference*, 90 AM. J. PUB. HEALTH 407, 409-10 (2000).

[26] *See* Linda G. Pucci & Michael Siegel, *Exposure to Brand-Specific Cigarette Advertising in Magazines and Its Impact on Youth Smoking*, 29 PREVENTIVE MED. 313, 315-18 (1999).

[27] *See* Caroline Schooler, *Seventh Graders' Self-Reported Exposure to Cigarette Marketing and Its Relationship to Their Smoking Behavior*, 86 AM. J. PUB. HEALTH 1216, 1220 (1996) (finding that adolescents' perceived exposure to tobacco advertising is associated with self-reported tobacco use even *after* the powerful influences of friends and family are controlled for); *see also* Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538, 1545 (1995); Bruce K. Armstrong, *Influence of Education and Advertising on the Uptake of Smoking by Children*, 152 MED. J. AUSTL. 117, 120 (1990).

[28] In 1999, the industry spent less than $54 million (0.7 percent of total expenditures) on outdoor advertising. *See FTC Report 1999* at tbl.3F.

travel routes that pass by, or who frequent, the stores where these ads appear.[29] Most importantly, unlike newspapers and magazines, outdoor advertisements are unavoidable and produce a captive audience.

In Massachusetts, as elsewhere, outdoor tobacco advertisements are concentrated near schools. A 1996 study of six Boston neighborhoods found that "youth are heavily exposed to stationary, outdoor cigarette advertising, that this exposure is intense in areas close to public schools, that it is more intense in neighborhoods with more children . . . ." Linda G. Pucci et al., *Outdoor Tobacco Advertising in Six Boston Neighborhoods: Evaluating Youth Experience*, 15 AM. J. PREVENTIVE MED. 155, 158 (1998). Even more troubling, a 1998 study of more than 3,000 vendors found that "[s]torefronts located within 1,000 feet of a school were significantly more likely to display tobacco advertisements, and displayed more tobacco advertisements per vendor, than did storefronts located farther away from schools." *Storefront 1998* at 11. The majority of ads were displayed in convenience stores and gas stations, where illegal tobacco sales to youth are highest. *See id.* at 5.

4. The Proven Relationship Between Advertising Bans and Diminution in Youth Smoking

There is abundant evidence that, in countries where advertising has been banned or severely restricted, the percentage of young people who smoke has decreased more rapidly than in countries where tobacco promotion has been less restricted. *See* Toxic Substances Board, *Health or Tobacco: An End to Tobacco Advertising and Promotion*, at 64 (Wellington, New Zealand 1989) ("*Toxic Substances Board*"). Experience with these advertising bans provides the most re-

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[29] Leo Burnett, Marlboro's original advertising executive, described outdoor advertising as a vital factor in creating the success of Marlboro because its low cost enabled him to saturate the market and produce multiple exposures. LEO BURNETT, COMMUNICATIONS OF AN ADVERTISING MAN 217 (1961); *see also* POLLAY COMMENT at 15.

liable data on the impact of tobacco advertising, as they cause large changes in advertising volume and there is no doubt about causation. The British Department of Health evaluated the effects of full or partial advertising bans in Norway, Finland, Canada, and New Zealand and concluded that the advertising ban "indicates a significant effect. In each case the banning of advertising was followed by a fall in smoking on a scale which cannot reasonably be attributed to other factors."[30] This proof of smoking reduction is critical: By a conservative estimate, for each one percent of American teenagers who decide to smoke but who would not do so as a result of changed advertising practices, *there would be 10,000 fewer children in the United States hooked on tobacco each year — and at least 3,000 fewer projected deaths annually*. *See* POLLAY COMMENT at 18.

SUMMARY OF ARGUMENT

Far from applying strict scrutiny, as petitioners suggest, the Court should review the challenged regulations under a deferential standard. Because outdoor and in-store tobacco advertisements near schools and playgrounds exert an undue influence on the captive audience of youth who are exposed to such ads on a daily basis, this case presents precisely the sort of threat of coercion and deception that justifies lesser protection for commercial speech. Moreover, because selling tobacco products to minors is unlawful, the commercial promotion of such products near schools and playgrounds is less worthy of constitutional protection.

In any event, the challenged regulations satisfy even strict scrutiny. The Commonwealth's interests in reducing youth demand for tobacco products and eliminating overreaching and unfairness in their marketing are not only substantial, but compelling. The voluminous factual record amply confirms the commonsense propositions that tobacco ad-

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[30] Clive Smee, Department of Health, Economics and Operational Research Division, *Effect of Tobacco Advertising on Tobacco Consumption: A Discussion Document Reviewing the Evidence* 22 (1992).

vertising significantly influences youth smoking and that the challenged restrictions directly help suppress youth demand for tobacco products. Finally, because the regulations apply only to tobacco advertisements that make youth a captive audience, and thus leave open many alternative avenues for petitioners to communicate with adults, they are no more restrictive than necessary.

ARGUMENT

I. STRICT SCRUTINY OF THE CHALLENGED REGULATIONS IS PLAINLY INAPPROPRIATE.

Petitioners' argument that this case provides a vehicle for the unprecedented application of strict scrutiny to a regulation of commercial speech could not be more misplaced. While Legacy takes no position on the level of scrutiny that should apply in commercial speech cases generally, there are at least two factors here that warrant deferential review of the Commonwealth's regulations. First, given the immature and unsophisticated target audience and its captive nature, the incomplete and inaccurate tobacco ads at issue create precisely the kind of unfairness and deception in the consumer marketplace that make regulation appropriate. Second, such advertisements promote transactions that are in fact unlawful.

These factors make clear that this Court should apply, *at most*, the intermediate scrutiny standard articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 (1980). "The meaning of any expression and the legitimacy of its regulation can only be determined in context." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 426-27 (1992) (Stevens, J., concurring). The context in this case is what is by far the Commonwealth's most profound public health crisis: Tobacco kills more Americans annually than AIDS, alcohol, car accidents, homicides, suicides, illicit drugs, and fires *combined*. *See* FDA Final Rule, 61 Fed. Reg. at 44,398. Massachusetts is entitled to broad latitude to address this crisis.

A. The Challenged Regulations Target Inherently Unfair Speech to Which Children Are Involuntarily Exposed, and Such Speech Is Entitled to Minimal, if Any, First Amendment Protection.

This Court has long recognized a "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Based on this distinction, the Court has concluded that "[t]he Constitution . . . affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).[31]

Petitioners argue incorrectly that intermediate scrutiny should not apply here because that relatively deferential standard is limited to situations where "the government regulates advertising based on those particular commercial aspects of the speech that justify affording lesser constitutional protection to commercial speech in the first place." Lorillard Br. at 34. In fact, the Massachusetts regulations plainly *are* based

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[31] While petitioners and their *amici* make much of the fact that the challenged restrictions are content-based, *see, e.g.*, U.S. Smokeless Tobacco Br. at 10-11; Nat'l Advertisers Br. at 4-8, that is true of *all* commercial speech regulation, because such regulation necessarily focuses on a particular kind of speech. In any event, the Court's "decisions demonstrate that content-based restrictions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment." *R.A.V.*, 505 U.S. at 420 (Stevens, J., concurring).

Moreover, petitioners are clearly wrong that the exemption of anti-tobacco public service messages from the advertising restrictions warrants strict scrutiny as viewpoint discrimination. *See* Lorillard Br. at 39-41. Commercial speech restrictions by their nature apply only to advertisements that *promote* a good or service — such as tobacco, gambling, or legal services — because only such ads fit within the definition of commercial speech by "proposing a commercial transaction." *Ohralik*, 436 U.S. at 456.

on the attributes of outdoor and in-store tobacco advertisements that make such commercial speech worthy of far less constitutional protection: They are based squarely on the undue influence that such coercive advertising has in stimulating its youthful audience to consume a lethal product.

1. The Court's Precedents Concerning Laws Designed To Protect Children From Harmful Speech Warrant Deference Here.

The challenged regulations make clear on their face that they aim to protect children from commercial speech that directly influences the decision whether to use tobacco products, which, in turn, lead to catastrophic health consequences. The regulations were adopted "to address the incidence of [tobacco] use by children under legal age." 940 C.M.R. § 21.01; *see also id.* § 22.01. They apply only to advertisements that children cannot avoid even with the most careful parental oversight, and they apply only within 1,000 feet of a school or playground.

This Court has repeatedly recognized that such laws constitute a key exception to the rule that "people will perceive their own best interests if only they are well enough informed." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). While a state *generally* "does not have . . . broad discretion to suppress truthful, nonmisleading information for paternalistic purposes," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996), that is not the case where the state acts to protect *children* from harmful speech. The reason for this distinction is that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). Because a child does not make decisions in the same rational manner as

an adult, the principle that paternalistic regulations of speech are unnecessarily restrictive is inapposite.[32]

Thus, "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *Ginsberg*, 390 U.S. at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). The Court has made this distinction time and again. Based on the government's compelling interest in protecting children from harm, the Court has upheld speech-restrictive laws that would have been unconstitutional if adults were the only audience exposed to the speech.[33]

Relying on such cases as *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Butler v. Michigan*, 352 U.S. 380 (1957), petitioners and their amici argue that the Commonwealth's interest in protecting children cannot justify blocking adult access to tobacco companies' speech. See,

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[32] Recent opinions expressing an "aversion towards paternalistic governmental policies" are grounded on the idea that laws should not prevent "*men and women*," — *i.e.*, *adults* — "from hearing facts that might not be good for them." *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring) (emphasis added); *see also id.* at 528 (Thomas, J., concurring) (advocating heightened scrutiny with respect to regulations that ignore principle that "informed *adults* are the best judges of their own interests") (emphasis added). The Court has never held that it is suspect for a state to shield *children* from commercial speech for "paternalistic" purposes.

[33] *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (upholding Cable Act provision based in large part on "[t]he importance of the interest at stake here — protecting children from [harmful speech]"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684-85 (1986) (upholding sanctions on student based on lewd speech to captive audience of children); *FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1978) (upholding restrictions protecting children from indecent radio broadcast); *Ginsberg*, 390 U.S. at 631-33 (upholding statute that banned the sale of sexually explicit books to children).

e.g., Lorillard Br. at 47; Nat'l Advertisers Br. at 9-17. But these cases are easily distinguished, because, unlike here (a) the speech at issue did not render children a captive audience, and (b) the regulations in any event imposed far broader restrictions on such speech. Moreover, while the Court has stated that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," *Bolger*, 463 U.S. at 74, the regulations here not only leave tobacco companies free to mail advertisements to prospective customers (and to communicate through other channels, see *infra* Part II.C.2), but they target outdoor ads that often are viewed from a sandbox.

2. Strict Scrutiny Is Not Appropriate Where, as Here, the Speech in Question Is Incomplete and Thus Deceptive in Light of Its Immature Audience.

Although petitioners rely extensively on *44 Liquormart, Inc.*, that decision actually supports the challenged regulations, which restrict a form of "aggressive sales practice[] that [has] the potential to exert 'undue influence' over consumers." 517 U.S. at 498 (citation omitted). The Commonwealth restricts only those tobacco advertisements — outdoor ads near schools and playgrounds and in-store ads placed at kids' eye level — that are most likely to coerce and unfairly ensnare a captive audience of children, leaving them vulnerable to the inaccurate and destructive message (among others) that tobacco is associated with a healthy and attractive lifestyle. Such ads typically contain images that appeal particularly to teens — images of rebellion, romance, success, and sophistication. As the court of appeals recognized, these images lead children to believe that tobacco products are "part of the 'good life.'" *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 49 (1st Cir. 2000). By presenting incomplete information, such ads deceptively mask the devastation that tobacco actually causes.

Apart from the incomplete — and thus inherently inaccurate — images used by tobacco companies, the very ubiquity of tobacco ads leads immature and impressionable teens to overestimate the prevalence of smoking. And this overestimation, which makes cigarettes appear normal and innocuous, is a leading predictor of who will decide to smoke. *See supra* at 9. To "eliminate deception and unfairness in the way [tobacco products] are marketed, sold, and distributed," 940 C.M.R. §§ 21.01, 22.01, Massachusetts has done no more than require that commercial information about tobacco products "appear in such a form [and location] . . . as [is] necessary to prevent" such unfairness and deception. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24.[34] In these circumstances, this Court's precedents make clear that strict scrutiny is inappropriate.[35]

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[34] Contrary to petitioners' assertion that the Commonwealth conceded the "truthful and nonmisleading" nature of the tobacco ads at issue, Lorillard Br. at 35, the Attorney General's brief below did "*not* concede that the Companies' advertising 'concern[s] lawful activity and [is] not misleading,' such as to qualify for constitutional protection under the first prong of *Central Hudson*." Atty. Gen. 1st Cir. Br. at 31 n.15 (emphasis added) (alterations in original). Rather, the Attorney General did not seek summary judgment on that issue because the regulations directly promote a substantial interest and are narrowly tailored. *See id.*

[35] *See, e.g., 44 Liquormart, Inc.*, 517 U.S. at 501 ("less than strict review" is appropriate in such circumstances); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring) ("[R]ationales for treating commercial speech differently under the First Amendment" include "the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information."); *Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than inform it."); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (applying deferential standard of review in upholding restriction on marketing techniques that "enhance[d] the opportunity for misleading practices"); *see also R.A.V.*, 505 U.S. at 415 (Blackmun, J., concurring) (noting "[t]he simple reality . . . that the Court will never provide . . . cigarette advertising the level of protection customarily granted political speech," and thus that a restriction on tobacco advertising rests on the same principles that warrant according commercial speech less protection in the first place).

B. The Protection Appropriate for the Speech at Issue Is Further Diminished by Its Promotion of Unlawful Transactions.

While commercial speech promoting *lawful* activities is entitled to some measure of protection under the First Amendment, *see Florida Bar*, 515 U.S. at 623, commercial speech promoting *unlawful* transactions — such as the sale of cigarettes to minors — is entitled to none. *See Central Hudson*, 447 U.S. at 563; *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973). The tobacco ads at issue have both the purpose and effect of promoting tobacco use by youth, and they thereby undermine the Commonwealth's prohibition against the sale of tobacco products to minors.[36] Even to the extent that tobacco ads have a lawful purpose — encouraging adults to buy tobacco products — the fact that the industry's survival depends on replacing the 1.7 million smokers who die or quit each year with kids makes clear that encouraging youth to smoke is an important, but illegitimate, end. The Commonwealth's power to enforce its prohibition against tobacco sales to minors concomitantly entitles it to leeway to restrict speech that compromises that prohibition.

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[36] Petitioners' argument that the Master Settlement Agreement ("MSA") now prevents them from targeting youth in their advertisements, *see* Lorillard Br. at 45-46, is unpersuasive. The fact that a state attorney general can go to court in an attempt to show that a particular ad has a "primary purpose" of targeting youth, MSA § III(a) (J.A. 260), by no means signifies an end to such practices. Nor does it suggest that ads lacking such a "primary purpose" do not influence youth smoking when presented in areas where youth inevitably congregate. The tobacco companies' suggestion that youth are no longer a target for tobacco advertising — despite the fact that teens represent virtually all of the industry's new customers — is no more credible than their historic claims that smoking does not cause cancer or that nicotine is not addictive.

II. THE RESTRICTIONS ARE CONSTITUTIONAL UNDER *CENTRAL HUDSON* AND WOULD SURVIVE EVEN STRICT SCRUTINY.

Whatever level of scrutiny the Court applies, it should uphold the challenged regulations. There is no question that the Commonwealth's interests in reducing youth demand for tobacco products and eliminating overreaching and unfairness in their marketing are compelling. Moreover, the voluminous factual record compiled by Massachusetts powerfully confirms the commonsense propositions that tobacco advertising significantly influences youth smoking and that the challenged restrictions directly help suppress youth demand for tobacco products. Finally, because restricting ads that make children a captive audience is essential to suppressing youth demand for tobacco products, and because the restrictions leave open many alternative avenues for petitioners to communicate with their adult customers, the regulations are no more restrictive than necessary.

A. Reducing Teen Demand for Tobacco Products Is a Compelling Government Interest.

The Commonwealth has a compelling interest in reducing youth demand for tobacco products in an effort to reduce underage smoking. Data show that underage smoking leads to addiction, disease, and, in far too many cases, death. Adults who began smoking in their youth are more likely to be heavier smokers than those who began smoking as adults, *see* FDA Proposed Tobacco Regulations, 60 Fed. Reg. at 41,317; their level of nicotine dependence is generally higher, making it more difficult for them to quit, *see Surgeon General 1994* at 30-34; and males have a greater risk of lung cancer and other smoking-related diseases than males who begin smoking later, *see Surgeon General 1989* at 45 fig.3. In addition to the lasting effects of smoking on adults who began as youths, youth smoking also causes significant health problems for children and adolescents. *See Surgeon General 1994* at 15-29. For these and other reasons "tobacco

use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Brown & Williamson*, 529 U.S. at 161.

B. The Challenged Regulations Directly and Materially Advance the Commonwealth's Interest in Reducing Youth Demand for Tobacco Products and, in Fact, Are Necessary to Serving That Interest.

The voluminous record below confirming the link between tobacco advertising and youth smoking more than satisfies the Commonwealth's burden of demonstrating that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Indeed, the regulations are "necessary to serve the [Commonwealth's] asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

1. There Is Abundant Evidence That Tobacco Advertising Stimulates Youth Demand for Tobacco Products and That Advertising Restrictions Help Suppress Such Demand.

Overwhelming evidence supports the link between tobacco advertising and youth smoking. As described above (p.10), three recent studies have associated exposure to tobacco advertising with the decision by youths to start smoking. Both the FDA and the Surgeon General have concluded that advertising plays a major role in influencing children and adolescents to begin smoking. *See* FDA Final Rule, 61 Fed. Reg. at 44,466; *Surgeon General 1994* at 195. The FDA reviewed the scientific evidence and concluded that:

> Studies show that . . . exposure to tobacco advertising leads to favorable beliefs about tobacco use, that advertising plays a role in leading young people to overestimate the prevalence of tobacco use, and that these factors are related to young people's tobacco initiation and use.

FDA Final Rule, 61 Fed. Reg. at 44,488. Other studies also show that tobacco brand advertising has a disproportionate effect on youth smoking preferences in comparison to its effect on adults.[37]

The Commonwealth need not demonstrate but-for causation to justify the challenged restrictions. Rather, it must show only that the advertising it seeks to restrict promotes youth demand for tobacco products. And there is simply no question that it does.[38] As the scientific literature explains, regulations on tobacco advertising will not, "either by themselves or in combination with other tobacco control measures, . . . completely solve the teenage nicotine addiction problem, but they will certainly directly and materially contribute toward reducing teenage tobacco use." POLLAY COMMENT at 18.

In addition to the evidence linking tobacco advertising to youth smoking, there is also persuasive evidence that the specific approach the Commonwealth is pursuing here — tobacco advertising restrictions — is likely to succeed in reducing youth smoking. As discussed above (p.12-13), a variety of international examples demonstrate that severe restrictions or bans on tobacco advertising decrease youth smoking rates faster than they would have decreased otherwise. *See* Smee at 17-18; *Toxic Substances Board* at 64. These studies, coupled with the studies that correlate tobacco advertising with youth demand for tobacco products, demonstrate that the challenged restrictions will substantially reduce youth smoking and the harm it causes.

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[37] For example, minors smoke the three most heavily advertised brands — Marlboro, Camel, and Newport — at rates far higher than adults, while adults purchase a greater variety of brands that receive little advertising exposure. *See* Pollay et al. at 8 & tbl.1, 11.

[38] *See, e.g.*, D.L. O'Connell et al., *Cigarette Smoking and Drug Use in Schoolchildren: II Factors Associated with Smoking*, 10 INT'L J. EPIDEMIOLOGY 223, 230 (1981) ("Our data suggest to us that intervention in the field of cigarette advertising may be the most direct and effective means of reducing the prevalence of smoking in children.").

2. This Evidence Is Sufficient To Demonstrate That the Challenged Regulations Will Alleviate the Harms of Youth Smoking to a Material Degree.

The evidence submitted below is more than sufficient to meet the Commonwealth's burden under *Central Hudson* and this Court's other commercial-speech precedents. Indeed, it is sufficient to meet strict scrutiny because it demonstrates that advertising restrictions are an integral and necessary part of any effective effort to reduce underage smoking. Contrary to the suggestions of petitioners and their *amici*, *see* Lorillard Br. at 42-44; Newspaper Ass'n Br. at 11-14, neither the First Circuit nor the Commonwealth attempted to justify the restrictions based solely on the commonsense link between advertising and youth smoking.

Rather, the justification for the regulations consists of precisely the sort of scientific evidence, peer-reviewed studies, and historical data that this Court has previously found sufficient to justify advertising restrictions. *See Florida Bar*, 515 U.S. at 626-29.[39] Indeed, where the government's interest is compelling, as here, this Court has held that empirical data are not required at all. *See Burson*, 504 U.S. at 208; *see also Central Hudson*, 447 U.S. at 569 (even where state interest in reduced energy consumption was merely substantial, Court found "direct link" between advertising ban and that interest notwithstanding absence of empirical evidence).[40]

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[39] Petitioners cannot defeat the thorough legislative record that supports the challenged restrictions by pointing to the views of two professors who dispute some of the Commonwealth's scientific evidence. *See* Lorillard Br. at 42 n.6. The parties disputed some of the evidence presented in *Florida Bar*, 515 U.S. at 640 (Kennedy, J. dissenting), yet this Court had no trouble concluding that the government had met its burden given the clear weight of the evidence, *see id.* at 628-29.

[40] Contrary to the claims of petitioners and their *amici*, *see* Lorillard Br. at 42; Newspaper Ass'n Br. at 15-18, the Commonwealth is not required to prove a "causal link" between advertising and youth smoking through adjudicative facts or through an evidentiary hearing. First, "cau-

In contrast to the strong evidence in this case demonstrating a direct correlation between advertising restrictions and a reduction in youth smoking, the cases relied on by petitioners in which this Court has struck down limitations on speech involved restrictions that were only remotely related to the asserted state interest. For example, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993), this Court held that the "benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain[ed] in place was . . . 'minute'" and did not materially advance interest in promoting safety and aesthetic interests. Similarly, in *Virginia Board of Pharmacy*, this Court concluded that the advertising ban at issue did "not directly affect professional standards one way or the other." 425 U.S. at 769.[41] Here, the record contains evidence showing *both* that tobacco advertising promotes youth demand for tobacco products and youth smoking *and* that tobacco advertising restrictions reduce youth smoking. The record is thus more than sufficient to satisfy either intermediate or strict scrutiny.

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sation" is simply the wrong standard; the Court has never required a state to show anything other than that its restriction of commercial speech has a material *influence* on the problem the state is attempting to address. Second, the Court has not required evidentiary hearings, *see, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189 n.6 (1999) (government can meet its evidentiary burden by submitting "secondary sources and declarations"); rather, challenged restrictions need only be supported on the *legislative* record, which is ample here. *See Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) ("[T]he issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question.").

[41] *See also Bates v. State Bar*, 433 U.S. 350, 378 (1977) (overturning restriction on advertising designed to ensure "quality" of legal work, because ban was "an ineffective way of deterring shoddy work"); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977) (invalidating ban on use of "for sale" signs, because ban was only remotely connected (if at all) to goal of integrated housing).

C. The Challenged Regulations Are No More Extensive Than Necessary To Serve the Commonwealth's Compelling Interests.

Finally, the challenged regulations are no more extensive than necessary to serve the Commonwealth's compelling interest in reducing youth demand for tobacco products, and they are narrowly tailored to preserve ample alternative channels through which tobacco companies can communicate with adult customers. Indeed, the nature of the tobacco ads at issue and the Commonwealth's need to reduce youth demand for tobacco demonstrate that the regulations are the least restrictive means to this end.

1. Prohibiting Tobacco Ads That Make Children a Captive Audience Is Necessary To Suppress Youth Demand for Tobacco.

Massachusetts already has employed a variety of means to combat smoking by minors, with relative success,[42] yet underage smoking remains an enormous problem. Consistent with finding of the U.S. Department of Health and Human Services that even the most aggressive and punitive efforts to reduce sales of tobacco products to minors will fail to prevent youth from using tobacco, *see* Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492, 1502 (Jan. 19, 1996) ("HHS Final Rule"), the Commonwealth determined that it is imperative to reduce youth *demand* for tobacco to make a serious impact on usage. Not only is prohibiting tobacco ads in the locales where youth congregate closely tailored to that goal, but it is an indispensable means to that end.[43]

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[42] *See* United States Department of Health and Human Services, Centers for Disease Control and Prevention, *Best Practices for Comprehensive Tobacco Control Programs* (1999) (recognizing Massachusetts as a leader in tobacco control).

[43] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (if the city had a "sufficient basis for believing that billboards" pose a threat to the public, "then obviously the most direct and perhaps

By contrast, all of the supposedly obvious and more effective alternatives suggested by the tobacco companies, *see, e.g.*, Lorillard Br. at 45, relate exclusively to youth *access* to cigarettes, rather than youth *demand* for them. While access restrictions are an important part of any effort to combat youth tobacco use, such measures cannot fully address the epidemic of youth smoking, because youth always will be able to obtain cigarettes from friends and relatives. *See* HHS Final Rule, 61 Fed. Reg. at 1502. The access-related measures offered up by the tobacco companies thus cannot be considered "less-burdensome alternatives to the restriction on commercial speech," *Discovery Network*, 507 U.S. at 417 n.13 (1993), because they are not really alternatives at all.[44]

In particular, the fact that outdoor and in-store advertisements near schools and playgrounds are viewed daily by an audience of children who cannot avoid them demonstrates the close nexus between the challenged regulations and the goal of reducing youth demand for tobacco products. In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), this Court upheld Utah's complete ban on outdoor tobacco advertisements against an Equal Protection Clause challenge, relying on the important difference between outdoor advertising and other forms. As Justice Brandeis observed for the Court:

> Billboards, . . . placards and such are in a class by themselves. . . . Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people . . . have the mes-

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the *only* effective approach to solving the problems they create is to prohibit them") (emphasis added).

[44] In any event, as the First Circuit recognized, "[t]here are legitimate reasons why the state may not want to make underage tobacco use a crime; after all, the state's motivation is to protect children, not to institutionalize them." *Consolidated Cigar Corp.*, 218 F.3d at 51.

> sage of the billboard thrust upon them by all the arts and devices that skill can produce.

Id.[45]

This is precisely why Massachusetts decided to restrict outdoor advertising and in-store ads at kids' eye level, but *not* print advertising or other channels of communication. Absent the Massachusetts regulations, a child walking down the street to a school (where attendance is compulsory) or to a playground would be "practically helpless" to avoid bombardment by tobacco advertising. *Kovacs*, 336 U.S. at 86-87. That the regulations incidentally restrict some advertising that may be intended for adults does not undermine their validity: "[I]n order to achieve a broader objective such regulations may incidentally, *even deliberately*, restrict a certain amount of speech not thought to contribute significantly to the dangers with which the Government is concerned." *Greater New Orleans*, 527 U.S. at 194 (emphasis added).

2. The Challenged Restrictions Leave Open Many Alternative Channels for Tobacco Companies To Advertise to Adults.

The regulations preserve many avenues through which tobacco companies can communicate with adult customers. Indeed, this availability of alternative channels for speech means that Massachusetts could have banned *all* outdoor and

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[45] *See also Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (upholding restriction on the use of sound trucks because they left the public no choice but to be exposed to the speaker's message); *Lehman v. Shaker Heights*, 418 U.S. 298, 302 (1974) (distinguishing captive-audience situations from "the traditional settings where First Amendment values inalterably prevail"); *Rowan v. United State Post Office Dep't*, 397 U.S. 728, 736 (1970) ("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."). The Court also relied on this "captive audience" rationale in *Pacifica*, because the radio broadcast at issue was "uniquely pervasive." 438 U.S. at 748. Here, there is an even stronger case for upholding the challenged regulations: "The radio can be turned off, but not so the billboard." *Packer*, 285 U.S. at 110 (internal quotation and citation omitted).

in-store tobacco ads — not just those within 1,000 feet of a school or playground — and the objection regarding the reach of the 1,000-foot radius is thus a red herring. Even with a total ban on such ads, tobacco companies would remain free to advertise to adults in magazines and other print media, over the Internet, via direct mail, and in stores (above five feet off the ground).[46] In fact, although the advertising subject to regulation here qualitatively affects youth smoking in important ways, the restrictions on outdoor and in-store advertising affect only a quantitatively small portion of tobacco ads: Tobacco companies spent only $53 million on outdoor ads and $329 million on point-of-sale ads out of a total of $8.24 billion in advertising expenditures in 1999. *See FTC Report 1999* at tbl.3F.

This Court's commercial-speech precedents make clear that, by leaving open these alternative channels of communication, Massachusetts has regulated speech no more extensively than necessary. In *Florida Bar*, for example, the Court upheld a restriction on direct-mail solicitations for legal services because other channels remained open, including the opportunity to advertise "in newspapers and other media." 515 U.S. at 633. Here, too, because there is "no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about [tobacco] are sufficient," there is "no defect" in the Commonwealth's regulations.[47]

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[46] As the court of appeals noted, the regulations as written also permitted retailers to display small "tombstone" signs to convey information about tobacco products to adults. While the district court held that this provision was preempted by the FCLAA, and the Commonwealth did not appeal that ruling, the Commonwealth remains able to promulgate a statutorily acceptable tombstone provision. *See Consolidated Cigar Corp.*, 218 F.3d at 52 n.13.

[47] *Florida Bar*, 515 U.S. at 634; *see also Kovacs*, 336 U.S. at 88-89 ("That more people may be more easily and cheaply reached by" a certain mode of communication "is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nui-

While the challenged regulations would be valid even if not geographically limited, their application only to areas within 1,000 feet of a school or playground underscores their narrowly tailored nature. The Massachusetts Department of Health and the FDA have found that storefronts within 1,000 feet of schools and playgrounds are more likely to display tobacco ads (and more of them) than stores in other areas. *See supra* at 11-12; FDA Final Rule, 61 Fed. Reg. at 44,504, 44,507. Focusing on the areas where children are most likely to walk and play obviously demonstrates the close nexus between the advertising restrictions and the Commonwealth's child-protective goals. Petitioners repeatedly assert (Lorillard Br. at 2, 4, 45) that the geographical reach of the restrictions includes as much as 90 percent of the most populated areas of Massachusetts. But that figure is based on a survey of only three cities, *see* J.A. 161-67, and thus may be highly misleading with respect to smaller cities throughout the state. There is no question that the regulations allow tobacco companies to purchase *some* outdoor advertisements (in areas where children are less likely to be present), and to purchase in-store ads above children's eye-level. Given the multiplicity of other opportunities to purchase advertising in other forms, that is more than the Constitution requires.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the court of appeals.

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sance *when easy means of publicity are open.*") (emphasis added); *Metromedia, Inc.*, 453 U.S. at 550-51 (Stevens, J., concurring in part and dissenting in part) ("*Kovacs* . . . forecloses any claim that a prohibition of billboards must fall simply because it has some limiting effect on the communications market.").

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